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No. 93-7054

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

BRUCE EDWIN CALLINS,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Was the trial court required to instruct the jury on how to consider evidence of unadjudicated offenses when deciding the apppropriate punishment for Callins?

II. Did the procedures employed at the sentencing phase of the trial subject Callins to double jeopardy?

III. Did the fact that the jury sentenced Callins for the aggravated robberies before sentencing him for capital murder violate his right to due process?

IV. Is Callins entittled to review of his claim that evidence not presented to the jury could not be considered in answering the punishment issues, and was the jury able to give effect to the evidence of his youth and concern for the victim without the need for an additional instruction?

V. Was Callins deprived of the right to confront and cross-examine witnesses abridged by the trial court's refusal to allow him to impeach a witness with evidence that he was on deferred adjudication probation?

VI. Is the fact that Callins was not able under the law to claim self-defense for shooting the victim a violation of his right to due porcess?

VII. Did the court below employ the correct standard in determining that counsel rendered effective assistance?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein, by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus relief is published at 998 F.2d 269.

JURISDICTION

Callins seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Callins bases his claims upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Also implicated is Article 42.12 of the Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent has lawful custody of Callins pursuant to a judgment and sentence of the 213th District Court of Tarrant County, Texas, in Cause No. 22370, styled *The State of Texas v. Bruce Edwin Callins.* Callins was indicted for one count of capital murder of Allen Huckleberry while in the course of committing and attempting to commit the offense of robbery. In the same indictment, Callins was charged with the murder of Huckleberry and with six counts of aggravated robbery. The state dismissed three of the aggravated robbery counts prior to trial and proceeded on the remaining charges, to all of which Callins entered pleas of not guilty.

Jury selection began on April 13, 1982, and was completed on May 10, 1982. Trial began on May 12, 1982, and on May 18, 1982, the jury found Callins guilty of the capital offense and of two counts of aggravated robbery. On May 19, 1982, after a punishment hearing on the aggravated robbery charges, the jury assessed Callins' punishment at life imprisonment and a $10,000 fine on each count. The next day, after a further hearing on punishment for the capital murder charge, the jury answered affirmatively the special issues submitted pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure, and Callins was sentenced to death.

Callins' capital murder conviction was appealed to the Texas Court of Criminal Appeals, as required by law. Tex. Code Crim. Proc. Ann. art. 37.071(h) (Vernon Supp. 1993). The court initially reversed because state law did not allow for the joinder of property offenses and offenses against persons. On rehearing on the court's own motion, the misjoinder was corrected by reforming the verdict to delete the convictions for aggravated robbery, and the conviction and sentence for capital murder were affirmed. *Callins v. State,* 780 S.W.2d 176 (Tex. Crim. App. 1989).

When Callins did not timely file a petition for writ of certiorari, the trial court scheduled his execution for May 9, 1990. Callins subsequently filed a petition for writ of certiorari and an application for writ of habeas corpus in the trial court. The trial court modified the execution date to June 20, reviewed the habeas corpus application, entered findings of fact and conclusions of law, and recommended that relief be denied. The Court of Criminal Appeals denied relief on June 12, 1990. Callins then filed a petition for writ of habeas corpus and application for stay of execution in the United States District Court for the Northern District of Texas, Fort Worth Division. The Court granted a stay of execution on June 12, 1990. This Court denied the petition for writ of certiorari on June 25, 1990. *Callins v. Texas*, ___ U.S. ___, 110 S. Ct. 3256 (1990).

The United States magistrate judge issued his Findings, Conclusions, and Recommendations, concluding that Callins was not entitled to relief. Nonetheless, in an abundance of caution, the magistrate judge recommended that an evidentiary hearing be held on six of Callins' claims. After the hearing, the Honorable Terry R. Means, United States District Judge, adopted the findings and conclusions of the magistrate judge, entered additional findings and conclusions based on the evidence received at the evidentiary hearing, denied relief, and dismissed the petition. The Court of Appeals for the Fifth Circuit affirmed on August 6, 1993.

Callins v. Collins, 998 F. 2d 269 (5th Cir. 1993). Rehearing was denied on August 31, 1993.

B. Statement of Facts

The facts of the offense are accurately set out in the opinion of the Court of Criminal Appeals, on original submission:

> On June 27, 1980, at approximately 4:00 p.m., [Callins], armed with a gun, entered a bar in Tarrant County. Three patrons and three employees of the bar were present. [Callins] ordered the bartender to put money in a bag. He ordered the other five occupants to empty their pockets onto the bar or a pool table. [Callins] threatened to kill anyone who held anything back. Allen Huckleberry, who was sitting at the bar, did not surrender his wallet quickly enough to suit [Callins], and [Callins] shot him in the neck, causing him to bleed to death. [Callins] went through the deceased's pockets, gathered the property from the five other victims, including George Torrez and Kathy Harmon, and fled. According to a witness in the bar, before fleeing, [Callins] told the remaining occupants of the bar to "take care of (the deceased)" and to "give him [Callins] a few minutes, then (they) could call somebody to help the deceased."

Callins v. State, 780 S.W.2d at 179-80.

SUMMARY OF ARGUMENT

There are no special or important reasons for granting certiorari review in this case. The Due Process Clause did not require the trial court to inform the jury at the punishment phase that it had to find beyond a reasonable doubt that Callins had committed the unadjudicated offenses that the state introduced. The evidence was both relevant to the jury's punishment determination and sufficient to prove the second punishment issue. The jury was instructed that it had to find beyond a reasonable doubt, *i.a.*, that Callins would commit future acts of violence. In order to do that, it had to be convinced that he had committed the unadjudicated acts

relied on by the state. Thus, the evidence clearly was relevant to the second issue. In addition, each of the victims of the unadjudicated crimes testified during the punishment phase and positively identified Callins as the perpetrator. The jury had sufficient evidence that Callins had committed the other crimes to allow it to answer the second issue affirmatively.

Callins was not subjected to double jeopardy when the jury first determined his punishment for the aggravated robberies, including the fact that he had committed a murder during the robberies, and then, at a separate hearing, imposed punishment for the capital murder. At the first punishment hearing, the jury simply took into account other criminal behavior that Callins had engaged in, something that is highly relevant to the proper punishment. Double jeopardy concerns are not implicated in such cases. Just as there is no violation when a defendant is sentenced for being a repeat or an habitual offender, double jeopardy prohibitions are not violated where the jury was aware of and apparently took into account Callins' commission of the murder when it determined his punishment for the aggravated robberies, and then separately sentenced him for the capital murder.

Callins' right to due process was not violated by the bifurcated punishment proceeding used in this case. Contrary to his assertion that the jury did not know that it would have an opportunity to consider punishment separately for the aggravated robberies and the capital murder, the record reflects that the trial court instructed the jury that there would be separate proceedings for it to decide Callins' punishment for each of the two types of crimes for which he was convicted. Moreover, two jurors testified at the hearing on his motion for new trial that they knew there were going to be two separate punishment hearings and that punishment for the aggravated robberies and capital murder would be considered separately.

Callins cannot attack the Texas statute on the ground that certain mitigating evidence could not be considered by the jury when that evidence could have been but was not introduced at trial. It cannot be denied that Callins' evidence of drug abuse and troubled childhood was admissible at the punishment phase. His failure to introduce this evidence prevented review of his challenge to the statute, as the court below found. As for evidence of Callins' youth, this Court has expressly held that Texas juries have "a meaningful basis to consider the relevant mitigating qualities of petitioner's youth" in answering the punishment issues.

Callins' contention that, without a definition of the term "deliberately" in the first issue, the jury could not give mitigating effect to the evidence that he told the victim not to worry is without merit. As the court below noted, if the jury found these to be expressions of remorse for what he had done, it could conclude that Callins would not commit such acts in the future and, therefore, return a negative answer to the second punishment issue. Additionally, unlike the evidence in *Penry,* Callins' evidence had only mitigating effect; it could not have supported affirmative answers to the punishment issues. Thus, there was no need for an additional instruction defining "deliberately."

The trial court did not abridge Callins' right to confront and cross-examine the witnesses against him by preventing him from questioning a witness about his deferred adjudication probation status. Although a defendant has the right to bring to the jury's attention a reason a witness might have to be biased in favor of the state, the record here reflects that Callins' only rationale for wanting to expose the witness' status was to impeach his general credibility because he had been charged with a crime and, therefore, was less believable than someone not so charged.

Further, under both state and federal law, impeachment of a witness is appropriate only if the witness had been convicted of a crime. If the person received a probated sentence, the conviction could be used for impeachment only

if the period of probation had not expired. Deferred adjudication, however, is neither a conviction nor a probated sentence under Texas law. Thus, the witness never had been convicted of any crime, and the fact that he was on deferred adjudication probation was not available for impeachment purposes.

Even had Callins asserted a right to use the evidence of deferred adjudication to show bias or prejudice in favor of the state, the court's refusal to let him do so was not constitutional error. There is no contention that the witness, rather than Callins, committed the kidnapping about which he testified. In addition, the state had nothing to offer the witness in exchange for his testimony, and nothing to hold over him to pressure him into identifying Callins, since whether the original theft charges would be adjudicated depended on the witness' complying with the terms of his probation. Consequently, Callins was not prohibited from using other appropriate means of cross-examination designed to show a form of bias on the part of the witness.

Finally, even if the trial court's ruling were a violation of Callins' right to confrontation, the error was harmless. Under the standard announced in *Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710 (1993), trial errors such as this one cannot form the basis for habeas corpus relief unless the petitioner shows that the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, ___ U.S. at ___, 113 S.Ct. at 1714, quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Callins wholly fails to make the required showing.

Callins asserts that he was denied due process by not being allowed to assert self-defense for the killing of the victim. As the court below found, both common sense and Texas law hold that a person in the course of committing a felony is not entitled to plead self-defense when the victim uses force to thwart the crime.

The record belies Callins' contention that counsel were ineffective for failing to develop and introduce mitigating evidence of his good character and drug usage and, even if counsel were deficient, Callins failed to show prejudice from their performance. Callins' attorney testified that he asked family members for names of possible witnesses to use at the punishment hearing but received no helpful information. Even had he been able to locate and call witnesses to describe Callins' good character and his later drug addiction, there is no reasonable probability that the outcome of the sentencing hearing would have been different. Given the wanton and senseless manner in which the murder was committed, coupled with Callins' deliberate and violent behavior following the murder, and the complete absence even in subsequent habeas proceedings of any evidence that Callins' actions resulted from drug addiction, it cannot rationally be said that there is a reasonable probability that a jury presented with such evidence would have answered one of the punishment issues negatively, so that a life sentence would have been imposed. The court of appeals correctly found that Callins had failed to show prejudice from counsel's alleged deficiency.

The court below correctly characterized the assertion that counsel should have offered the defense of self-defense as "nothing short of ludicrous in light of common sense and long-standing Texas precedent." Because Texas law does not make available a claim of self-defense in circumstances such as those in this case, failing to argue self-defense was not unreasonable on counsel's part.

Callins' assertion that his attorneys allowed several potential jurors to be excused on the state's challenge for cause unnecessarily because they were ignorant of the standard for disqualifying jurors is not supported by the record. One of his attorneys stated that he felt "in a general way" that if a prospective juror could not consider imposing a death sentence, he or she would be disqualified. This is very similar to this Court's expression of the standard that a venire member

is disqualified from serving on a capital jury if his views on capital punishment would prevent or substantially impair his performance of his duties. A juror who could not consider imposing a death sentence would certainly be substantially impaired in the performance of his duties as a juror. Further, the record reflects that counsel thoroughly questioned most of the potential jurors challenged by the state and that, after the questioning, each was properly dismissed. Only when the state's interrogation conclusively demonstrated that a juror was not qualified did counsel choose not to engage in a protracted and unnecessary *voir dire*.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Callins has advanced no special or important reasons in this case, and none exists. The case presents only the issue whether the court below correctly applied settled principles to law to the facts, and therefore raises no important issue of law.

II.

AN INSTRUCTION AT THE PUNISHMENT PHASE ON HOW TO CONSIDER EVIDENCE OF UNADJUDICATED OFFENSES WAS NOT NECESSARY TO PROTECT CALLINS' RIGHT TO DUE PROCESS.

At the capital punishment phase of the trial, the state relied on evidence of several extraneous unadjudicated offenses that Callins had committed to support an affirmative answer to the second punishment issue: whether there was a

reasonable probability that Callins would continue to commit criminal acts of violence that would constitute a continuing threat to society. Tex. Code Crim. Proc. Ann. art. 37.071(b)(2). The offenses included several that occurred in connection with the capital murder: Callins' kidnapping and assault of Arthur King, a murder threat against Ricky Henderson, the firing of a shot at Paul Ethridge and Stephen Henry, and his flight to avoid arrest. In addition, the state introduced testimony from Ray Baldwin, SR 33:995-1004, Roger Allen, SR 33:1015-22, Robert Allen Rosales, SR 34:1093-1105, Everitt R. White, SR 34:1202-10, and Robert Lynn Sanders, SR 34:1218-26, concerning assaults and armed robberies that Callins had committed; from Dennis Green, SR 34:1079-87, about an assault with a knife and burglary of a building that Callins committed; and from Officer J.E. Gallagher, SR 34:1238-45, about Callins' hitting him with an ashtray when Gallagher went to Callins' home in response to a family disturbance call. Callins contends that he was denied due process because the jury was not instructed at the punishment phase how it was to consider the evidence in answering the punishment issues. He maintains that the jury had no guidance as to the quantum of proof required before it could utilize the evidence, and that this rendered his sentence unfair.

Ordinarily, evidence of other crimes committed by a defendant is not admissible against him because of the danger that the jury might convict because it believed that he is a bad person generally, regardless of what the evidence shows about his guilt of the crime on trial. However, those concerns disappear where, as here, the evidence is admissible only at the punishment phase of the trial.[1]

---

[1]Under Texas law, unadjudicated offense evidence is admissible only in capital murder trials. It was because of this that the trial court divided the sentencing portion of the trial into two phases, one for the aggravated robbery, where the evidence of the unadjudicated offenses was not admissible, and one for the capital murder, where it was.

Further, fears that the defendant might be punished for conduct other than that for which he is on trial are satisfied by "properly applied standards of relevance and sufficiency of proof." *Milton v. Procunier,* 744 F.2d 1091, 1097 (5th Cir. 1984), *cert. denied,* 471 U.S. 1030 (1985). Evidence of prior criminal conduct clearly is relevant to a capital murder jury's sentencing determination, particularly to the second issue. *Landry v. Lynaugh,* 844 F.2d 1117, 1121 (5th Cir.), *cert. denied,* 488 U.S. 900 (1988); *Williams v. Lynaugh,* 814 F.2d 205, 207-08 (5th Cir.), *cert. denied,* 484 U.S. 935 (1987). Consequently, there is no requirement that there be a final conviction for evidence of the conduct to be admissible at the punishment phase. *Id.; Milton v. Procunier,* 744 F.3d at 1097.

As for sufficiency of proof of the unadjudicated crimes, Callins has no room to complain. Each of the extraneous offenses introduced were accompanied by testimony of the victims, all of whom positively identified Callins as the perpetrator of the crime in question. Even if there were a requirement that the state prove beyond a reasonable doubt that Callins committed the extraneous crimes, a rational jury could have found from the evidence before it that Callins was guilty of the offenses. Thus, Callins can show no constitutional violation in the failure of the court to instruct the jury on consideration of evidence of unadjudicated offenses at the capital murder punishment phase of his trial.

In addition, because of the interpretations of the state and federal courts that have reviewed this issue previously, a holding consistent with Callins' position would require the adoption of a new rule in a case on collateral review, in violation of *Teague v. Lane,* 489 U.S. 288 (1989). The rule Callins seeks would not place primary conduct beyond the government's power to proscribe or a class of persons beyond its power to punish in certain ways. *Penry v. Lynaugh,* 492 U.S. 302, 239-40 (1989). Hence, the *Teague*'s first exception is inapplicable. Nor would the rule fall within the second *Teague* exception, reserved for bedrock rules

of criminal procedure that are necessary to ensure a fundamentally fair trial. *See Saffle v. Parks,* 494 U.S. 484, 486 (1990). Callins' contention is not deserving of the grant of certiorari.

III.

CALLINS WAS NOT SUBJECTED TO DOUBLE JEOPARDY BY THE SENTENCING PROCEDURES EMPLOYED IN THIS CASE.

During argument at the aggravated robbery punishment phase, the prosecutor urged the jury to remember the facts of the case, including the fact that Callins had committed a murder during the robbery, when it was deciding what an appropriate punishment would be. SR 33:906. Callins now contends that he was subjected to double jeopardy because he was punished twice for the murder: once in connection with the aggravated robberies and once for the capital murder itself.

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the state from punishing a person more than once for the same offense. *Justices of Boston Municipal Court v. Lydon,* 466 U.S. 294, 308-09 (1984). Double jeopardy concerns are not implicated, however, when, as here, a defendant is sentenced for the crime of which he has been convicted and the sentencer merely takes into account additional criminal behavior. Thus, there is no double jeopardy violation when a defendant is sentenced for being a repeat or an habitual offender, *Williams v. Oklahoma,* 358 U.S. 576, 584-86 (1959), because, in considering the extraneous behavior, the sentencer is not imposing "punishment" as that term is used in connection with the Double Jeopardy Clause. The defendant is punished only for the crime for which he is convicted, but that crime is deemed more serious because of his other criminal behavior. *Id.; United States v. Carey,* 943 F.2d 44, 46 & n.4 (11th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 1676 (1992). It follows

that the Double Jeopardy Clause is not offended by the procedure employed here, where the jury was aware of and apparently took into account Callins' commission of the murder when it determined his punishment for the aggravated robberies, and then separately sentenced him for the capital murder. *Williams v. Oklahoma, supra; Gryger v. Burke,* 334 U.S. 728, 732 (1948). This issue does not warrant the granting of certiorari.

IV.

CALLINS WAS NOT DENIED DUE PROCESS BY HAVING THE JURY IMPOSE SENTENCE FOR THE AGGRAVATED ROBBERIES BEFORE SENTENCING HIM FOR THE CAPITAL MURDER.

Because evidence of unadjudicated offenses is not admissible in Texas during the punishment phase of noncapital trials but is admissible in capital trials, the court held two separate punishment proceedings. The jury first heard evidence pertaining to the aggravated robberies. It returned with punishments of life imprisonment and a $10,000 fine for each conviction. Then it heard evidence relating to punishment for the capital murder. It answered the punishment issues affirmatively and Callins was sentenced to death. He contends that this procedure deprived him of due process because the jury was unaware that there would be two sentencing opportunities. He asserts that, once the jury had assessed the maximum penalty for the aggravated robberies, it had no choice but to return a death sentence in the capital murder case.

Callins' allegation fails as a factual matter, as the court below found. At the conclusion of the guilt-innocence portion of the trial, the court instructed the jury that there would be separate proceedings for it to decide Callins' punishment for the aggravated robberies and for capital murder. The instructions, in relevant part, were as follows:

> You will recall that several times during the trial of this case you have been informed that in the event a jury finds a Defendant guilty of a criminal offense, we go into a bifurcated trial.
>
> You have found the Defendant, Bruce Edwin Callins, guilty of capital murder as charged in Count One of the Indictment and of aggravated robbery as charged in Counts Seven and Eight of the Indictment. The trial of this particular case will be in three segments, the first of which has just been concluded.
>
> In the second portion of the trial, you may hear evidence in regard to the punishment to be assessed for the offense of aggravated robbery of which you have found the Defendant guilty in Counts Seven and Eight of the Indictment. After you have heard that evidence, the Court will then prepare the appropriate Court's charge and the case will be argued to you and you will deliberate your verdict or verdicts with regard to Counts Seven and Eight.
>
> When you have returned your verdicts as to Counts Seven and Eight of the Indictment, we will then proceed with the third portion of the trial, at which time you may hear additional evidence from either or both sides bearing on the appropriate punishment to be affixed for the offense of capital murder for which you have found the Defendant guilty in Count One of the Indictment.

SR 33:868-69. The instruction plainly informed the jury of the procedure that was going to be followed in determining the punishments for Callins' crimes. It was quite apparent from the instruction that there were to be two distinct punishment hearings, one for the aggravated robberies, and another one for the capital murder. The jury clearly was aware that punishment was to be assessed separately for each of the offenses.

In addition, the trial court held a hearing on Callins' motion for new trial at which two jurors testified about their understanding of the punishment proceedings. Both jurors Treva Roberts, SR 37:60-61, and Larry Kramer, SR 37:88-89, testified that they were aware that the punishment hearing on the aggravated robberies was going to be separate from the hearing on capital murder, and that none of the jurors expressed any confusion on the matter during jury deliberations. As the court of appeals noted, the sentence of death "appears the product less of confusion than of that 'reasoned *moral* response' required by the caselaw." *Callins v. Collins*, 998 F.2d at 275, quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in *Brown*). This issue, involving only factual matters decided against him, is not worthy of the Court's attention.

V.

CALLINS' FAILURE TO OFFER EVIDENCE OF HIS TROUBLED CHILDHOOD AND DRUG ABUSE DISENTITLED HIM TO A MITIGATING EVIDENCE INSTRUCTION, AND THE JURY WAS ABLE TO GIVE EFFECT TO HIS EVIDENCE OF YOUTH AND CONCERN FOR THE VICTIM WITHOUT AN ADDITIONAL INSTRUCTION.

Callins alleges that he was denied the right to be free from cruel and unusual punishment by the operation of the Texas capital sentencing statute, which he contends prevented him from offering evidence of his troubled childhood and drug abuse as mitigating evidence. He argues that this evidence could be considered by the jury only as supporting an affirmative answer to the second issue, even though jurors might be convinced that he was not as culpable for his actions because of the evidence. He also asserts that the jury could not give mitigating effect to his evidence of youth -- he was twenty years old at the time of

the murder -- and to his expressions of concern for the victim, in violation of his rights under the Eighth Amendment.

The sentencer in a capital murder case "must be able to consider and give effect to [mitigating] evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). The court of appeals has recognized, however, that a habeas petitioner cannot attack the Texas statute on the ground that certain mitigating evidence could not be considered by the jury when that evidence could have been but was not introduced at trial. *Lincecum v. Collins*, 958 F.2d 1271, 1282 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 417 (1993); *Barnard v. Collins*, 958 F.2d 634, 638 (5th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 990 (1993); *Wilkerson v. Collins*, 950 F.2d 1054, 1061 (1992), *cert. denied*, ___ U. S. ___, 113 S.Ct. 3035 (1993); *May v. Collins*, 904 F.2d 228, 232 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 770 (1991); *DeLuna v. Lynaugh*, 890 F.2d 720, 722 (5th Cir. 1989). It cannot be denied that Callins' evidence of drug abuse and troubled childhood was admissible at the punishment phase. *See Drew v. State*, 743 S.W.2d 207, 217 (Tex.Crim.App. 1987) (evidence of alcohol and drug abuse and troubled family relations); *Cordova v. State*, 733 S.W.2d 175, 189 (Tex.Crim.App. 1987) (evidence of alcohol abuse). The court below correctly concluded that Callins' failure to introduce this evidence prevented review of his challenge to the statute. As for evidence of Callins' youth, this Court has expressly held that Texas juries have "a meaningful basis to consider the relevant mitigating qualities of petitioner's youth" in answering the punishment issues. *Johnson v. Texas*, ___ U.S. ___, ___, 113 S.Ct. 2658, 2669 (1993).

Callins also contends that, without a definition of the term "deliberately" in the first issue, the jury could not give mitigating effect to the evidence that he told the victim not to worry, that he would be alright, and told others at the scene to call for help after he had left. As the court below noted, to the extent that the jury

found these to be genuine expressions of remorse for what he had done, it could conclude that Callins would not commit such acts in the future and, therefore, return a negative answer to the second punishment issue.[2] *Callins v. Collins*, 989 F.2d at 275. Moreover, unlike the evidence in *Penry*, Callins' evidence was purely mitigating; it could not have supported affirmative answers to the punishment issues. Thus, unlike the case in *Penry*, there was no need for an additional instruction.[3]

VI.

CALLINS' RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION WERE NOT ABRIDGED BY THE TRIAL COURT'S REFUSAL TO ALLOW HIM TO IMPEACH A WITNESS WITH THE FACT THAT HE WAS ON DEFERRED ADJUDICATION PROBATION.

Approximately half an hour after committing the capital murder, Callins entered a residential construction site, pulled a gun on Ricky Don Henderson, and demanded to know who owned a jeep parked outside. Henderson took Callins to Arthur Wilson, the jeep's owner, who also was Henderson's boss. Callins forced Wilson at gunpoint to drive him to another location. As he departed with Wilson,

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[2]If Callins is arguing that his comments demonstrate that he did not believe the victim was going to die, the first issue clearly encompassed the evidence. In addition to asking whether the defendant's conduct was committed deliberately, the first issue required the jury to consider whether the defendant acted with the reasonable expectation that the death of the victim or another would result. Tex. Code Crim. Proc. Ann. art. 37.071(b)(1) (Vernon 1974).

[3]Callins also complains that the Texas statute did not give the jury the option of showing mercy if it believed that the issues should be answered affirmatively but that the defendant should not be sentenced to death. The Court has foreclosed this argument in *Saffle v. Parks*, 494 U.S. 484, 493 (1990): "It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary."

Callins fired shots at Henderson and another worker. Henderson testified about the incident at trial and identified Callins as the person who assaulted him with a gun and kidnapped Wilson. SR 29:282-302. During a hearing outside the presence of the jury on Callins' motion to suppress the identification, Callins attempted to impeach Henderson's credibility with the fact that he was then on deferred adjudication probation for theft over $200. SR 25:180-210. The court disallowed the attempted impeachment because Texas law permitted impeachment by a prior conviction only where the conviction was final and deferred adjudicaton is not a final conviction. SR 28:206-16. Callins did not cross-examine Henderson when the jury returned. He contends now, as he did below, that the trial court's action impermissibly infringed on his Sixth Amendment right to confront and cross-examine Henderson to show a possible motive for testifying as he did.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the opportunity to cross-examine the witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). This Court has recognized "'that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986), quoting *Davis v. Alaska*, 415 U.S. at 316-17. Thus, where a defendant articulates a possible motive on the part of a witness for testifying against him but is prevented from questioning him about that matter, he is denied the protection of the Confrontation Clause. *Delaware v. Van Arsdall*, 475 U.S. at 679. Applying this standard, there was no constitutional error in the trial court's ruling.

The record reflects that the only rationale Callins expressed for wanting to expose Henderson's deferred adjudication status to the jury was to impeach Henderson's general credibility because he had been charged with a crime and,

therefore, was less believable than someone not so charged. *Callins v. State,* 780 S.W.2d at 196.

> [T]his man was charged with felony theft, that he pled guilty to felony theft, that whether it may be in evidence or not, I'm not sure, but the Court may assume that the presiding Judge found the evidence sufficient to substantiate his guilt at the time of taking the plea and clearly shows that this man has been guilty of felony theft and that he's admitted to it and that it's been processed, and not to permit the Defendant to use this to impeach the credibility of Mr. Henderson would be a mere distinction without a difference. It's permitting a very technical point to deny the Defendant a very valuable right to impeach the credibility of the witness. . . .

SR 28:207-08; *see also* 28:210 (issue is whether the witness is believable under oath after pleading guilty to offense); 28:216 (evidence reflects heavily on witness' credibility).

At the time of Callins' trial, however, under both state and federal law, impeachment of a witness was appropriate only if the witness had been convicted of a crime. Tex. Code Crim. Proc. Ann. art. 38.29 (repealed); Fed. R. Evid. 609; *see* Tex. R. Crim. Evid. 609(a). If the person received a probated sentence, the conviction could be used for impeachment only if the period of probation had not expired. Tex. R. Crim. Evid. 609(a)

Deferred adjudication, however, is neither a conviction, Tex. Code Crim. Proc. Ann. art. 42.12(5)(c); s*ee United States v. Garcia,* 917 F.2d 1370, 1375 (5th Cir. 1990), *citing Martinez-Montoya v. Immigration & Naturalization Service,* 904 F.2d 1018 (5th Cir. 1990), nor a probated sentence under Texas law. *Green v. State,* 663 S.W.2d 145 (Tex.App. -- Houston [1st Dist] 1984, PDR ref'd); Tex. Code Crim. Proc. Ann. art. 42.12 §3(d)(a) (Vernon Supp. 1993). Thus, Henderson

had never been convicted of any crime, and the fact that he was on deferred adjudication probation was not available for impeachment purposes.

Even had Callins asserted a right to use the evidence of Henderson's deferred adjudication status to show bias or prejudice in favor of the state, the court's refusal to let him do so was not constitutional error. In both *Davis* and *Van Arsdall,* where the Court found Sixth Amendment violations, the witnesses whom the defendants were prevented from cross-examining could themselves have been suspects or, as in *Van Arsdall,* could have agreed to testify in exchange for having other charges pending against them dismissed. *See Davis,* 415 U.S. at 311; *Van Arsdall,* 475 U.S. at 676. Here, however, there is no contention that Henderson, rather than Callins, committed the kidnapping about which he testified. In addition, the state had nothing to offer Henderson in exchange for his testimony, and nothing to hold over him to pressure him into identifying Callins, since whether the original theft charges would be adjudicated depended on Henderson's complying with the terms of his probation.[4] Consequently, Callins was not "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Id.* at 680.

Finally, even if the trial court's ruling were a violation of Callins' right to confrontation, the error was harmless, as the Court below found. Under the standard announced in *Brecht v. Abrahamson,* ___ U.S. ___, 113 S.Ct. 1710 (1993), trial errors such as this one, *Van Arsdall,* 475 U.S. at 684, cannot form the basis for habeas corpus relief unless the petitioner shows that the error "had substantial and injurious effect or influence in determining the jury's verdict."

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[4]Callins suggests that the state could have threatened to charge Henderson with perjury if he did not identify Callins, raising the possibility that the deferred adjudication would be revoked and Henderson would be sentenced to up to ten years in prison. To the exntent that this might have happened, or was even a possibility, the restriction on cross-examination was harmless. *See infra* at 16-17.

Brecht, ___ U.S. at ___, 113 S.Ct. at 1714, quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). The factors to be considered in such an analysis include the importance of the witness' testimony to the state's case, whether the testimony was cumulative, whether there was corroborating or contradicting evidence on material points of the witness' testimony, the extent of cross-examination otherwise permitted, and the overall strength of the state's case. *Id.*

Callins suggests that, had Henderson been impeached, the jury might have found him guilty of murder rather than capital murder. He bases this on the fact that other witnesses testified that Callins had expressed some concern for the victim and told one of the dancers to call an ambulance after he was gone. However, the element that made the murder a capital crime is that it was committed during an aggravated robbery. *See* Tex. Penal Code Ann. § 19.03(a)(2) (Vernon Supp. 1993). Even if Henderson had been impeached, that would not have changed the circumstances of the crime, committed before Callins encountered Henderson, so that Callins might have been convicted of murder rather than capital murder.

Nor can it be said that Henderson's testimony had a substantial and injurious effect on Callins' conviction and sentence. It certainly was not a critical part of the state's evidence against Callins. The testimony merely established the beginning of the episode in which Callins kidnapped Arthur Wilson, who then identified items, proven to be the murder victim's, in Callins' possession. SR 29:353-54. Further, Henderson's identification of Callins was cumulative and corroborative of that of Steven Henry, SR 29:305-11, Paul Ethridge, SR 29:320-25, and Arthur Wilson, SR 29:334-43, each of whom were present during the incident and who also identified Callins in court. At the hearing on Callins' motion to suppress the identification, he was given free rein to cross-examine Henderson about his identification, SR 25:194-211, and there is nothing to indicate the same would not have been true had Callins chosen to conduct

cross-examination at trial. Moreover, the state's case on guilt was solid, inasmuch as Callins was positively identified by witnesses at the scene of the murder, two of whom knew him personally. SR 28:42-44; 29:243-44. It is clear that any error in not allowing inquiry into Henderson's deferred adjudication probation did not rise to the level that would warrant the granting of relief. Because the court below applied the correct harmless error standard, *see Callins v. Collins*, 998 F.2d at 274, this allegation does not deserve the grant of certiorari.

VII.

CALLINS WAS NOT DENIED DUE PROCESS BY BEING UNABLE, UNDER THE LAW, TO CLAIM THAT THE KILLING IN THE COURSE OF AN AGGRAVATED ROBBERY WAS SELF-DEFENSE.

Callins has maintained that he shot the victim because he thought he was reaching for a weapon. Under Texas law, a person in the course of committing a felony cannot claim self-defense against a victim of the felony who is lawfully defending himself. *Westley v. State*, 754 S.W.2d 224, 230 (Tex.Crim.App. 1988). Callins contends that he was deprived due process by operation of the law that forces a felon to choose "between death at the hands of a robbery victim or death by the legal system." Petition at 25.

According to Texas law, a person is justified in using force, including deadly force, when he or she reasonably believes the force is necessary to protect against another's use of *unlawful* force. Tex. Penal Code Ann. § 9.31(a) (Vernon 1974). Force is not unlawful if the actor reasonably believes it is necessary to prevent another from committing an aggravated robbery. *Id.* § 9.32. Callins' only argument against this statutory system is that it forces someone like him, who is committing a felony, to choose either to be killed by the victim or to kill the victim and face execution by the state. Conveniently left out of the posing of what he

sees as a dilemma is any discussion of how this violates his right to due process. Only by assuming that he had a right to commit aggravated robbery could Callins sustain his argument that he was due the process of self-defense in this case.[5]

VIII.

THE COURT BELOW CORRECTLY DETERMINED THAT COUNSEL RENDERED EFFECTIVE ASSISTANCE AT TRIAL.

Callins asserts that his trial attorneys rendered ineffective assistance because they did not know of the range of possible mitigating evidence that could have been introduced, they did not raise the issue of self-defense, and they did not conduct a proper *voir dire* of prospective jurors, resulting in the excusal of several members of the panel who might have been qualified to serve.

Habeas petitioners claiming ineffective assistance by counsel must meet the two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail, a criminal defendant must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. In reviewing such claims, "judicial scrutiny of counsel's performance must be highly deferential," *Id.* at 689, and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and a defendant must overcome the presumption that the

[5]Callins cites to *Government of the Virgin Islands v. Smith*, 949 F.2d 677 (3rd Cir. 1991) to support his contention. *Smith* is wholly inapposite. There, the court held that, on the facts of that case, the defendant was entitled to an express jury instruction that the state was required to prove beyond a reasonable doubt the absence of self-defense. 949 F.2d at 680-82. The case was decided as a matter of statutory interpretation of Virgin Islands law and not as a matter of constitutional law. Callins' argument does not concern whether his jury should have been instructed on the issue of self-defense, but whether an aggravated robber is entitled to assert self-defense, something that was not at issue in *Smith*.

"challenged action 'might be considered sound trial strategy.'" *Id.* To demonstrate prejudice, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, quoted in *Lockhart v. Fretwell*, ___ U.S. ___, ___, 113 S. Ct. 838, 842 (1993).

It is not sufficient that the habeas petitioner merely allege deficiency on the part of counsel; he must affirmatively plead prejudice in his petition. *Hill v. Lockhart*, 474 U.S. 52, 60 (1986). A claim may be disposed of for either reasonable performance of counsel or lack of prejudice, and if one is found dispositive it is unnecessary that the court address the other. *Strickland*, 466 U.S. at 697.

Callins criticizes counsel for not knowing about and informing him of the wide range of mitigating evidence that can be presented in a capital murder case. However, he totally fails to identify any such evidence that counsel should have been aware of and developed at trial. Assuming that he is referring to the same evidence he did in his brief in the court below, *i.e.*, evidence of his good background and nature prior to his drug addiction, his claim of counsel's ineffectiveness was properly resolved by the court below.

As the court of appeals noted, the record belies Callins' contention and he failed to show prejudice from counsel's performance. Although Callins' attorney testified that he wanted to introduce evidence of Callins' good reputation and steady employment record, FEH 79,[6] and that he asked family members for names of possible witnesses to use at the punishment hearing, FEH 95, he received no information that was helpful. Even had he been able to locate and call witnesses to describe Callins' good character and his subsequent drug addiction, there is no reasonable probability that the outcome of the sentencing hearing would have been different. Evidence of Callins' good character undoubtedly would have been rele-

[6]"FEH" refers to the transcription of the federal evidentiary hearing, followed by the page number.

vant to the second punishment issue, and evidence of drug usage, to the extent that Callins' criminal behavior could be shown to be attributable to it, would have been relevant to both the first and the second issues. However, given the wanton and senseless manner in which the murder was committed, coupled with Callins' deliberate and violent behavior following the murder, and the complete absence even in subsequent habeas proceedings of any evidence that Callins' actions resulted from drug addiction, it cannot rationally be said that there is a reasonable probability that a jury presented with such evidence would have answered one of the punishment issues negatively, so that a life sentence would have been imposed. The court of appeals correctly found that Callins had failed to show prejudice from counsel's alleged deficiency. *Callins v. Collins*, 998 F.2d at 278.

The court below correctly characterized the assertion that counsel should have offered the defense of self-defense as "nothing short of ludicrous in light of common sense and long-standing Texas precedent." *Id.* Because Texas law does not make available a claim of self-defense in circumstances such as those in this case, failing to argue self-defense was not unreasonable on counsel's part.

Finally, Callins asserts that his attorneys were ignorant of the standards for qualifying venire members in a capital murder trial and that, consequently, they allowed several potential jurors to be excused on the state's challenge for cause unnecessarily. He seizes on the statement of one of his attorneys at the evidentiary hearing that he felt "in a general way" that if a prospective juror could not consider imposing a death sentence, he or she would be disqualified. FEH 83. In the first place, this is a correct statement of the law; a venire member is disqualified from serving on a capital jury if his views on capital punishment would prevent or substantially impair his performance of his duties. *Wainwright v. Witt*, 469 U.S. 412 (1985). A juror who could not consider imposing a death sentence would certainly be substantially impaired in the performance of his duties as a juror.

Even if this understanding were not wholly accurate, however, counsel noted that Callins' was the only capital case he had tried and it had been nine years before the time of the evidentiary hearing. FEH 83. It would hardly be surprising if his knowledge of the intricacies of capital litigation was not completely up to date.

Callins' criticism of counsel also ignores the reality of his performance. The record reflects that counsel conducted a thorough *voir dire* of the jury venire. The state challenged twenty-seven potential jurors because of their opposition to the death penalty. Tr 114-25. Each time, counsel objected to the challenge. In several instances where a prospective juror appeared not to be emphatic in his or her feelings, Callins' attorney conducted an examination into the basis for each person's attitude and attempted to determine whether there were circumstances under which any of them could consider death as an appropriate punishment. In every case the venire member became resolute in stating that they could not (SR 5:239-42 (Luce); 6:400-02 (Burcie); 7:700-02 (Davis); 7:733-34 (Woolen); 7:751-60 (Brown); 8:919-20 (Moore); 9:1032-39 (Siver); 9:1072-73 (Wolfe); 12:1580-82 (Rev. Jackson); 13:1337-38 (Williams); 19:2777-83 (Landers)).

The record reflects that counsel did not question fifteen of the challenged venirepersons concerning their views on capital punishment (SR 8:932-33 (White); 10:1224 (Scott); 18:2495 (King); 18:2514 (Sneed); 20:2951 (Reubush); 20:3023 (Ray); 21:3055 (Moreno); 21:3099 (Swor); 21:3202 (Ephland); 22:3215 (Raburn); 22:3246 (Chapman); 23:3482 (Kasten); 23:3561 (Harris); 23:3571 (Call); 24:3706 (Sherman)). In addition, counsel's examination of venireman Denton was very brief on this issue (SR 22:3338-39). However, each of these individuals expressed such emphatic opposition to imposing a death sentence on direct examination (SR 8:914-16, 918-19; 10:1222-23; 18:2489-95; 18:2508-13; 20:2948-51; 20:3018-23; 21:3052-55; 21:3097-99; 21:3198-3202; 22:3213-15; 22:3242-43; 22:3335-38; 23:3479-82; 23:3557-60; 23:3566-70; 24:3700-03), that the decision not to pursue

the matter must be considered a sound strategic decision. Callins does not indicate how counsel might have proceeded otherwise to try to qualify the potential jurors; indeed, it is clear from the record that each of them was excludable under the appropriate standard. This issue does not warrant the granting of certiorari.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the petition for writ of certiorari be denied.

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